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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

EVAN DANIEL GRUENERT,

Defendant and Appellant.

A153741

(Alameda County  
Super. Ct. No. 177665)

Defendant was placed on felony probation after he pleaded no contest to two counts of unlawful sexual intercourse with a minor. Several months later, the prosecution filed a petition to revoke defendant's probation. He admitted to violating probation and agreed his probation would be modified to include a condition prohibiting him from using social media "of any form." On appeal, defendant contends the probation condition prohibiting use of social media is constitutionally vague and overbroad. We requested the parties provide supplemental briefing discussing whether this court has jurisdiction to consider this appeal as defendant failed, pursuant to Penal Code<sup>1</sup> section 1237.5, to obtain a certificate of probable cause. Defendant concedes his challenge to the probation condition effectively challenges the validity of his plea but argues this matter should be remanded for the trial court to clarify the meaning of "social media." For reasons we will explain, we decline to remand, and dismiss the appeal.

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<sup>1</sup> All statutory references are to the Penal Code.

## **I. BACKGROUND<sup>2</sup>**

It is unnecessary to provide significant detail regarding defendant's offenses, since he presents only a facial challenge to the social media probation condition. Briefly, 26-year-old defendant and 14-year-old Jane Doe first met through Instagram. They continued to communicate through Instagram, texting, and telephone calls, and exchanged photos of their genitals and of themselves nude. Jane Doe had sexual intercourse with defendant on two occasions. She eventually cut off contact with defendant because she felt she was being used.

Defendant was charged in an information with multiple sexually related felonies. Pursuant to a negotiated agreement, on May 16, 2017, defendant pleaded no contest to two counts of unlawful sexual intercourse with a minor. (§ 261.5, subd. (d).) The trial court placed defendant on probation for five years.

On October 13, 2017, the prosecution filed a petition to revoke probation. Defendant admitted to violating his probation. In exchange for his admission, defendant agreed his probation would be modified to include two new conditions prohibiting him from being active on social media,<sup>3</sup> and from having contact with any minors, except under the supervision of a nonrelated adult over the age of 40.<sup>4</sup>

Defendant filed a timely notice of appeal.

## **II. DISCUSSION**

### ***A. Probation Condition Prohibiting Defendant from Using Social Media***

As noted above, in the underlying offenses, defendant used social media to contact Jane Doe for sexual purposes and then engaged in sexual acts with her.

When the deputy district attorney informed the trial court of the agreement reached on defendant's probation violation, he stated in part, "We're also going to

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<sup>2</sup> The facts of the underlying offenses are taken from the probation report.

<sup>3</sup> Defendant was already the subject of a five-way search clause which allowed law enforcement to search his computers or phones.

<sup>4</sup> Defendant has not challenged the condition prohibiting him from having contact with any minors without supervision of an adult.

modify his probation to include a condition that he not be active in any social media whatsoever. That’s Instagram, Facebook, Snapchat, anything.” The trial judge thereafter in accordance with the negotiated agreement restored defendant to probation, and modified defendant’s terms and conditions of probation to include defendant was “not to utilize social media of any form, and you’re not to have contact with minors in any manner whether it be on the internet, by phone, in person, anything, unless you’re under the supervision of an adult over the age of 40.” Defendant did not object to the conditions as imposed.

**B. *The Need for a Certificate of Probable Cause***

Defendant now challenges the probation condition prohibiting him from “ ‘being active in any social media whatsoever,’ ”<sup>5</sup> arguing it is unconstitutionally vague and overbroad. We do not need to address the substance of defendant’s challenges, however, because as we shall explain, defendant failed to obtain a certificate of probable cause allowing him to appeal from his revocation of probation following his admission of violation. As a result, defendant’s claims are not reviewable on appeal.

As noted above, we obtained supplemental briefing discussing the application of section 1237.5 to defendant’s contentions on appeal. Section 1237.5 requires a defendant to obtain a certificate of probable cause to appeal from “a judgment of conviction upon a plea of guilty or nolo contendere, *or a revocation of probation following an admission of violation . . .*” (Italics added.)

“An order revoking probation while imposition of judgment is suspended is not directly appealable, but is reviewable on appeal from the judgment following the revocation. [Citations.] It is the disposition after a probation revocation that is appealable.” (*People v. Sem* (2014) 229 Cal.App.4th 1176, 1186.) Moreover, in *People v. Maultsby* (2012) 53 Cal.4th 296, 304, our Supreme Court clarified that the purpose of requiring defendants to obtain certificates of probable cause is to promote judicial

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<sup>5</sup> We assume defendant is referring to the court-ordered condition, “you’re not to utilize social media of any form . . .”

economy by “screening out wholly frivolous appeals after guilty or nolo contendere pleas.” A certificate of probable cause is thus required when a defendant raises issues involving matters occurring before a plea of guilty or no contest affecting the plea’s validity. (*People Kaanehe* (1977) 19 Cal.3d 1, 8.) These same principles apply to an admission of a probation violation. (*People v. Billetts* (1979) 89 Cal.App.3d 302, 307–308.) “Absent a certificate of probable cause, the issues raised by defendant concerning the validity of his admission of violation of probation, are not reviewable on appeal.” (*Id.* at p. 308.)

Importantly, “a challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself.” (*People v. Panizzon* (1996) 13 Cal.4th 68, 79.) “[T]he critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5.” (*Id.* at p. 76; *People v. Sem*, *supra*, 229 Cal.App.4th at p. 1187.)

Here, as defendant concedes, his constitutional challenges seeking to strike his social media prohibition condition as vague and overbroad effectively dispute the validity of the plea and not postplea matters, because he specifically agreed to the condition. Because he did not obtain a certificate of probable cause, he acknowledges, with one exception, that his challenge to the social media condition is not cognizable on appeal.

Defendant maintains, however, that his claim the term “social media” is vague should be remanded to the trial court “to specify” what the term encompasses. To fully comply with this condition, defendant argues he needs to seek “clarity” from the trial court “as to what internet usage is prohibited.” He argues this is a “noncertificate grounds issue” relating to postplea matters not affecting the validity of the plea.

We disagree. Defendant’s request for clarification of the term “social media” is not a postplea matter but a challenge to a part of his sentence to which he agreed in the plea bargain and as such is regarded as a challenge to the validity of the plea, requiring a

certificate of probable cause. Because defendant did not obtain a certificate of probable cause to challenge the validity of the plea, his claims on appeal are not reviewable.<sup>6</sup>

### **III. DISPOSITION**

Accordingly, defendant's appeal is dismissed.

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<sup>6</sup> Since the trial court still has jurisdiction in this case, as defendant remains on probation, he may consider filing in the trial court a motion for clarification of the term "social media."

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Margulies, J.

We concur:

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Humes, P. J.

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Sanchez, J.

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